Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

No. 02-661

In The
Supreme Court of the United States
October Term, 2002

In Re Federal-Mogul Global, Inc.

BMW North America, Inc., British Motor Cars Distributors, Inc., Harley-Davidson Motor Company Group, Inc., Hennessy Industries, Inc., International Truck and Engine Corporation, MG Rover Group, Inc., Mercedes-Benz USA, LLC, Nissan North America, Inc., Volkswagen of America, Inc., Volkswagen AG, and Volvo Cars North America, Inc., ("International Auto Companies"),

Respondents.

On Petition for Writ of Certiorari to the United States of Court of Appeals for the Third Circuit

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 20, 2002

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondents hereby state as follows:

All shares of BMW North America, LLC are held in BMW (U.S.) Holding Corporation. BMW (U.S.) Holding Corporation is owned by Bayerische Motoren Werke Aktiengesellschaft, a German entity.

British Motor Cars Distributors, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Harley-Davidson Motor Company Group, Inc. is wholly owned by H-D Michigan, Inc. which is wholly owned by Harley-Davidson, Inc.

Hennessy Industries, Inc. is wholly owned by Danaher Corporation.

International Truck and Engine Corporation is a wholly owned subsidiary of Navistar International Corporation.

MG Rover Group, Inc. is ultimately owned by MG Rover Holdings, Limited, which is a privately held entity.

Mercedes-Benz USA, LLC is wholly owned by Daimler-Chrysler North America Holding Corporation, which in turn is wholly owned by DaimlerChrysler AG.

Nissan North America, Inc. is a wholly owned subsidiary of Nissan Motor Company, Ltd.

Volkswagen of America, Inc. is a subsidiary of Volkswagen Beteiligungs-Gesellschaft mbh, which is wholly owned by Volkswagen AG.

Volkswagen AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Volvo Cars North America, Inc. is a privately held company. It is a subsidiary of Volvo Car Corporation which is a subsidiary of Ford Motor Company.

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INTRODUCTION

The International Auto Companies[1] support the Petition for Writ of Certiorari filed by DaimlerChrysler Corporation, Ford Motor Company and General Motors Corporation (the "Domestic Auto Companies"). Like the Domestic Auto Companies, the International Auto Companies could be engulfed by the tidal wave of asbestos litigation. That wave has not only swept away those manufacturers of amphibole-containing asbestos products that can cause disease, but has also threatened to drown even those companies that have merely incorporated chrysotile-containing asbestos components, manufactured by others, into their products. Federal-Mogul Global, Inc. is among the most recent victims and the Domestic and International Auto Companies are targeted as well. That threat is not merely on the horizon for the Domestic and International Auto Companies, their employees and their shareholders - it has arrived.

This case presents an opportunity to confront this looming disaster head-on: not through mass settlements or devices that this Court has determined to be legally unavailable. *See e.g. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Rather, the courts below were asked only to apply jurisdictional and procedural rules that are well-established and congressionally-mandated to achieve an orderly and just resolution of thousands of fundamentally flawed claims. The

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[1] "International Auto Companies" is the informal designation given to a group of companies that share common positions in this matter. All of these entities are organized under American law, except for MG Rover Group, Inc. and Volkswagen AG. The International Auto Companies consist of BMW North America, Inc., British Motor Cars Distributors, Inc., Harley-Davidson Motor Company Group, Inc., Hennessy Industries, Inc., International Truck and Engine Corporation, MG Rover Group, Inc., Mercedes-Benz USA, LLC, Nissan North America, Inc., Volkswagen of America, Inc., Volkswagen AG, and Volvo Cars North America, Inc.

district court, however, misapplied those provisions and frustrated not only the attempt to dispose of the claims at issue on the merits, but also appellate review of that misapplication.

The Third Circuit's refusal to review the district court's decision sets it apart from its sister courts of appeals and has created a conflict among the circuits. Moreover, the Third Circuit's determination is simply erroneous. Therefore, the International Auto Companies respectfully submit that the petition for certiorari should be granted so that this Court may resolve the circuit conflict and allow this matter to be adjudicated on its merits.

A favorable resolution of this circuit split would return this case to the Third Circuit to address whether the thousands of asbestos claims removed to federal court and provisionally transferred to the District of Delaware are related to the Federal-Mogul bankruptcy. If the Third Circuit determines that these claims are related and orders them transferred to the Federal-Mogul bankruptcy, the bankruptcy court can convene an omnibus proceeding to determine whether asbestos plaintiffs can present admissible expert testimony that friction products can cause asbestos-related disease. *See, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). By finding no reliable evidence to support causation, that *Daubert* determination would effectively resolve a substantial segment of the so-far uncontrolled tidal wave of litigation involving friction products that otherwise threatens an entire industry.

STATEMENT OF THE CASE

The International Auto Companies adopt the Statement of the Case contained in the Petition for Writ of Certiorari filed by the Domestic Auto Companies.

The International Auto Companies find themselves in the same position as the Domestic Auto Companies and Federal-Mogul Global, Inc., the debtor in the Chapter 11 proceedings below. All have been hit by a tidal wave of lawsuits claiming

that benign, nonfriable friction products which were incorporated into the products they made or sold years ago have caused injury. Since the medical and scientific communities have definitively determined that friction products do not cause asbestos-related disease, those claims are wholly without merit. Nevertheless, the cost of defending those claims coupled with the innate uncertainty of litigation have struck and will continue to strike blows to these companies.

After the Federal-Mogul bankruptcy filing in October 2001, the International Auto Companies, like the Domestic Auto Companies, removed asbestos-related cases from state court to federal court under the bankruptcy removal statute, 28 U.S.C. § 1452(a). Pursuant to the bankruptcy court's broad "related to" jurisdiction, those cases were then provisionally transferred to the Federal-Mogul bankruptcy pending in the District of Delaware. After the district court denied the motions for a permanent transfer, the International Auto Companies joined the Domestic Auto Companies in an appeal to the Third Circuit. After the Third Circuit denied the appeal, the International Auto Companies joined in an unsuccessful emergency motion to recall the mandate to allow the entry of a stay and an unsuccessful application to this Court for an emergency stay.

The International Auto Companies respectfully submit this brief in support of the petition for certiorari filed by the Domestic Auto Companies.

REASONS FOR GRANTING THE WRIT

I. THE SUBSTANTIVE ISSUES PRESENTED TO THE COURTS BELOW ARE OF CRITICAL AND FUNDAMENTAL IMPORTANCE.

The importance of the proceedings below cannot be overstated. At stake is the ability of an entire industry to defend itself from the onslaught of groundless mass litigation supported only by junk science. Since the defense of this litigation alone - irrespective of any awards that may result – threatens to distort the American judicial system into an elephantine threat to the American economy, a means of resolving those claims in omnibus fashion within the framework of existing statutory schemes must be afforded close and considered evaluation. Moreover, that framework will have an immediate material impact upon the debtor's estate, its administration and the claim resolution process.

This Court's reluctance to impose novel limitations upon the destructive and seemingly immortal American asbestos litigation without express legislative authority has been consistent and longstanding. *See, Ortiz, supra* and *Amchem, supra*. The Federal-Mogul bankruptcy, however, presents the Court with a unique opportunity to employ congressionally-mandated means to begin the process of bringing order to this chaotic mass tort dilemma. The friction product claims against the Domestic and International Auto Companies are directly related to the Federal-Mogul bankruptcy. These claims should be resolved in the context of that bankruptcy pursuant to 28 U.S.C. § 1334(b), because they will necessarily affect the size and administration of the bankruptcy estate and the development of a confirmable plan of reorganization.

Thus, the district court should have granted the Domestic and International Auto Companies' motions to transfer the friction product claims to the Federal-Mogul bankruptcy. Indeed, it is the very essence of the federal judiciary's Constitutional duty to administer justice efficiently, in a manner

fair to all litigants and through the use of all the tools and procedure provided by Congress and the Constitution.

Once those claims are transferred to the Federal-Mogul bankruptcy, that court can efficiently conduct a *Daubert* hearing on whether sound, scientific evidence supports the allegation that friction products can cause disease. This simple, cost-effective and orderly plan for resolving tens of thousands of asbestos claims in a matter of months has no equal. In fact, no alternative plan has ever been proposed - except the shamefully wasteful and inequitable war of attrition that has already resulted in dozens of unsuccessful asbestos-related Chapter 11 proceedings. Upon the bankruptcy court's recognition that there is insufficient scientific evidence that friction products can cause disease, thousands of asbestos claims will be dismissed and cleared from the court's docket.

The single *Daubert* hearing on this issue will be conducted quickly and at limited expense. In contrast to the present chaos and injustice, this arrangement will provide a faster and far more efficient means of resolving tens of thousands of claims than is possible in any other jurisdiction. Far from delaying the claim-handling process, this procedure will resolve thousands of claims in a matter of months. No state court in the nation has the ability to accomplish such a feat.

The district court rejected the argument that these thousands of claims are related to the Federal-Mogul bankruptcy because it portended only chaos. However, this careful and well-considered vision is the solution. The solution is premised upon exhaustive scientific and medical research which has established one unmistakable truth: automotive friction products are not capable of causing asbestos-related disease. Forcing Federal-Mogul to litigate that issue in the Delaware bankruptcy court, while making the Domestic and International Auto Companies continually litigate the identical issue in hundreds of courtrooms across the country only widens the tidal wave's path of destruction. Establishing the invalidity of plaintiffs' claims in one forum where every party, including future claimants, is

already present and represented by counsel constitutes a quantum leap forward in the sound and just administration of asbestos litigation -- an opportunity that should not be lost.

Where science, medicine, sound judicial management, authoritative case law, the United States Code and the Federal Rules of Evidence unite to create an opportunity to solve a substantial portion of the asbestos crisis, fear of the unknown is not an acceptable escape. The district court's refusal to exercise its congressionally-mandated jurisdiction over tens of thousands of claims inextricably interwoven with the Federal-Mogul bankruptcy was based on an unarticulated fear of "looming chaos." In refusing to do anything, however, the district court embraced the very chaos that afflicts the American judicial system.

The momentous substantive issue of whether the thousands of asbestos claims against the Domestic and International Auto Companies are related to the Federal-Mogul bankruptcy should not be dismissed without appellate review.

II. THE THIRD CIRCUIT ERRED IN REFUSING TO EXERCISE APPELLATE JURISDICTION.

The Third Circuit failed to seize the day. It had appellate jurisdiction to review the district court's order, but failed to recognize that fact. The district court's order should receive appellate review so that the issue of whether thousands of asbestos claims are related to the Federal-Mogul bankruptcy can be decided on its merits.

A. The District Court's Order Denying Transfer of the Friction Product Claims is Subject to Appellate Review.

As the Domestic Auto Companies articulated in their Petition for Writ of Certiorari, the Fourth and Sixth Circuits have held that an order granting or denying a motion to transfer in a bankruptcy matter is appealable as both a final and collateral

order. *See In re Dow Corning Corporation*, 86 F.3d 482 (6th Cir. 1996) and *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986) *cert. denied*, 479 U.S. 876 (1986). In the face of this highly persuasive precedent in virtually identical factual settings, the Third Circuit erroneously ruled that it could not review the district court's transfer order. That error effectively deprived the Domestic and International Auto Companies' right ever to obtain meaningful appellate review of these crucial issues. Because the Third Circuit's decision is in sharp contradistinction to the law adopted by the Fourth and Sixth Circuits, certiorari is warranted.

B. The District Court's Order Remanding the Provisionally Transferred Friction Product Claims Directly to the State Courts From Which They Were Removed is Subject to Appellate Scrutiny.

As the Domestic Auto Companies articulated in their Petition for Writ of Certiorari, an order attempting to remand claims directly to state courts and across jurisdictional lines is appealable. The Third Circuit failed to appreciate that it had the power to review the remand order as beyond the district court's statutory authority. The district court simply ignored the plain statutory framework that governs removal and remand.

The Third Circuit stretched the holding of *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), to reach this conclusion, which, as the Domestic Auto Companies point out, is inconsistent with a variety of other circuit court decisions. Moreover, the Third Circuit simply ignored the plain statutory language authorizing remand only to "[t]he court to which such claim or cause of action is removed." 28 U.S.C. S 1452(b).

Like the Domestic Auto Companies, the International Auto Companies seek here only the opportunity to present their substantive position on the merits. The Third Circuit improperly denied that opportunity in a published decision that conflicts with numerous other circuit court decisions nationwide. For these reasons, certiorari is warranted.

CONCLUSION

In order to avoid the grave inequity resulting from the Third Circuit's refusal to scrutinize the district court's erroneous order and the far-reaching consequences of that failure, the International Auto Companies respectfully urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

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